Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

Director's Thoughts

By the time you read this the 2014 General Session of the Utah Legislature will be history. Choose your own exclamation! Because the Spring Conference (April 10-11) will include a thorough 2014 legislative summary, I'm not going to inflict upon you another discussion of pending bills. If you have not already registered for the Spring Conference, go to the UPC website, www.upc.utah.gov, and get yourself registered. I'll see you there.

As all of you are aware, there is a good deal of activity that takes place before and during a legislative session on behalf of prosecutors, civil side public attorneys, law enforcement, counties and cities. I suspect that many of you have only a general idea of the true extent of that effort. I want to try to explain the extent of that effort and the tremendous contributions of time, talent and expertise that takes place and express thanks and appreciation to those who help with that legislative effort.

First, the players. I do not intend to name individual names because a) including all who deserve mention would take up half a page and b) I would certainly miss people who would deserve inclusion in any such list. Let's however, just take a look at the alphabet soup of organizations. SWAP, SWAP-LAC, CIV-LAC, MIS-LAC, the AG, UCDAA, UMPA, UMAA, UAC, The League, LELC – and I'm probably forgetting some. All of these groups work because many dedicated and knowledgeable people volunteer their time and expertise, in most cases in addition to the hours they put into their day jobs. True, there are a handful of full time, paid executive directors and CEOs, but they would be the first to tell you that their efforts would be to little avail without the help of the volunteer "cast of thousands."

The effort to watch and influence legislation does not, of course, just magically begin on the first day of the session. Nor does it end – except for a week or two of well deserved rest – after the gavel comes down sine die. As I'll try to show, this largely volunteer effort goes on throughout the year.

In the criminal law area SWAP often gets the majority of the credit, and sometimes the blame. SWAP was organized back in the early 70s. It has a board of 18 directors that includes county and district attorneys, city attorneys, the Attorney General, civil and criminal deputy county and district attorneys, and the UMPA officers. That board usually meets four times during the year. As you can imagine, however, such a large board cannot take care of day to day issues that pop up.

Most of SWAP's legislative work is accomplished through its Legislative Affairs Committee (SWAP-LAC). Made up

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of experienced prosecutors from both county and city offices, SWAP-LAC meets regularly throughout the year, and weekly during the legislative session. A concerted effort is made to include representation from outside of Salt Lake County and, to the extent possible, from off the Wasatch Front. The experience and judgment of the SWAP-LAC members is absolutely vital in formulating informed prosecutorial positions on proposed and pending legislation.

A few years ago it was decided that misdemeanor legislation didn't always get the attention it deserved so SWAP formed MIS-LAC. Just like SWAP-LAC, the MIS-LAC members, experienced misdemeanor prosecutors, meet regularly throughout the year, with greater frequency during the session. Important in MIS-LAC efforts is the Utah Municipal Prosecutors Association (UMPA). Virtually all DUI, DV and traffic related legislation, plus other misdemeanor stuff, gets thoroughly vetted by the committee.

Formally organized a little over five years ago, the Utah County and District Attorneys Association (UCDAA) has a strong influence on both criminal and civil side legislation. While it doesn't have its own full time representative on the hill, it strongly influences legislative positions taken by SWAP, UAC and others. During the 2013 session, for instance, UCDAA, working though a number of its members, pretty much single handedly defeated a bill that appeared to be on its way to easy passage.

As a statewide elected office whose budget is set by the legislature, the Attorney General's Office must obviously be deeply involved in legislative affairs. In addition to its own legislative concerns, budgetary and otherwise, however, it coordinates its effort to good effect with SWAP, law enforcement and others. Despite the turmoil that surrounded the office for all of 2013, culminating just days before the beginning of the legislative session in a complete change of leadership, General Reyes and his team have hit the legislative ground running.

Moving away from public attorney groups, but staying in the criminal realm, the Law Enforcement Legislative Committee (LELC), of which SWAP and the Attorney General's Office are members, packs very real influence on the hill. Any legislator who proposes legislation effecting criminal law or law enforcement is anxious to know LELC's position. Its members come weekly to the hill from all around the northern half of the state. I find it tremendously informative to sit in LELC meetings and listen to the ideas and concerns expressed by its members.

In addition to prosecution, all public attorney offices in Utah also have civil side responsibility. It may be the former that gets the majority of the publicity, but it is the latter that effects the citizens and public officials more directly – and keeps the county or city governing body and executive happy, or not. The effort to track and influence civil legislation is equal to that on the criminal side.

SWAP's Civil Legislative Affairs Committee (CIV-LAC) was formed a number of years ago when it was realized that SWAP-LAC had its plate full with criminal legislation, and that its members lacked the expertise to adequately cover civil side bills. Membership on CIV-LAC includes experienced civil side attorneys from county and city offices as well as representatives from UAC other related groups. As with the above named groups, it meets monthly throughout the year, and weekly during the session.

No discussion of governmental legislative effort would be complete without acknowledging the tremendous work done by the Utah Association of Counties (UAC) and the Utah League of Cities and Towns (The League). Those groups have been fixtures on the hill and in Utah's legislative arena since well before SWAP and LELC were formed. Their legislative teams are tremendously experienced and are well respected by legislators. Both organizations draw heavily on the expertise of public attorneys. Both groups also lend their considerable support and influence to assist on the criminal side when requested. That support and influence has made the difference in many instances.

With the exception of a relatively small handful of paid staff members in SWAP, the Attorney General, UAC, and the League, virtually all of the work done by the above named organizations is accomplished by volunteers who carve out time in their already very full calendars to help make a difference. I think I can safely say that most of those volunteers kind of enjoy getting involved in the legislative effort, but that involvement nonetheless entails considerable time to become adequately informed about legislation, and more time in following up on committee assignments.

Because of the good people who volunteer to help do the work of the above named organizations, legislative proposals and positions taken by and on behalf of Utah's public attorneys are more thoroughly vetted and are more likely to accomplish the intended goal. Furthermore, our citizen legislators, who come with their own ideas, opinions and experience, or lack thereof, are better informed about the consequences of legislation upon which they vote.

It takes lots of people to run the legislative sausage machine. It's often not pretty and, except for pretty much any other system ever tried, it's the worst way to effectuate the governance of a group of people. So, next time a colleague mentions time spent working on "some damn fool bill" or talks about having attended a meeting of at any of the groups mentioned in my alphabet soup list, express your thanks. They deserve it.

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United States Supreme Court

Military Installation Includes "Area Of Responsibility"

Defendant was ordered to not enter the Vandenberg Air Force Base after trespassing and vandalizing something. The Vandenberg base is a closed base meaning that civilians can not enter the base without express permission. However, the Air Force granted an easement across the base for two public highways to cross it. The Base commander has also designated an area, on the easement, as a public protest area. The Base commander has many restrictions for activity in the protesting area and issued an advisory stating that anyone who fails to adhere to the policies may be barred from entering the base. After defendant was ordered to not enter the base he continued to do so by entering the protest area. A magistrate judge convicted him of violating 18 U.S.C. § 1382, which makes it a crime to reenter a "military. . . installation" after having been ordered not to do so "by any officer or person in command." The Federal District court affirmed the conviction, but the Ninth Circuit reversed holding, "The easement through Vandenberg deprived the Government of exclusive possession, §1382 did not cover the portion of the Base where defendant's protest occurred."

The U.S. Supreme Court held, "A military installation encompasses the commanding officer's area of responsibility and it includes Vandenberg's highways and protest area for purposes of § 1382. The supreme Court further clarified, "The statute is written broadly to apply to many different kinds of military places, and nothing in its text defines those places in terms of the access granted to the public or the nature of the Government's possessory interest." *United States v. Apel*, 2014 BL 51707, U.S., No. 12-1038, 2/26/14

Co-habitant May Give Consent Over Non-present Objector

Defendant approached Able Lopez , which had just cashed a check at the bank, and told him he was in defendant's gang territory. Defendant, with the help of gang members, then proceeded to rob the man, beating him and stealing his wallet. Police were called to the scene and when they arrived someone told them that the guy that committed the robbery was in an apartment in the adjacent building. The officers could hear sounds of screaming and fighting coming from the building and went to the apartment to investigate. The officers knocked on the door and Roxanne Rojas opened the door. She was crying, looked like she had just been assaulted and was injured. The officers asked Rojas to step out of the apartment so they could conduct a protective sweep. However, defendant stepped into the doorway and informed the officers they couldn't enter. The officers removed defendant and arrested him. Lopez identified defendant as the man who robbed him. One hour after the arrest a detective returned to the apartment and asked to search the apartment for evidence of the robbery. The detective received written and oral consent to search the apartment and found evidence while searching.

Defendant moved to suppress the evidence found in the apartment claiming because defendant objected to the search Rojas could not consent to a search of the home. However, he was not present when Rojas consented and the trial court and court of appeals denied the motion to suppress. Defendant was convicted and sentenced to fourteen years in prison.

The U.S. Supreme Court granted certiorari and reiterated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting per-son with whom that authority is shared." The Court also reiterated that "*a physically present inhabitant's* express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." The court held that in this case defendant was not present when Rojas consented to the request to search the home and so her consent was consistent with past Supreme Court opinions. *Fernandez v. California*, 571 U. S. No. 12-7822 (2014)

Seizure During Lay-Over Doesn't Give Personal Jurisdiction

Petitioner, Anthony Walden, served as a police officer and a deputized DEA agent at the Atlanta Hartsfield-Jackson Airport. TSA informed Walden that respondents, Gina Fiore and Keith Gipson, had $97,000 in cash in their carry-on bags. Respondents explained that they were returning home after gambling in Puerto Rico. Petitioner seized the cash after a drug-sniffing dog performed a test on the cash and informed the couple that the cash would be returned if they later proved a legitimate source for the cash. The respondents then flew home and petitioner drafted an affidavit seeking

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PROSECUTOR PROFILE

Junior Baker
Spanish Fork City Attorney

Junior Baker was born in Salina, Utah and grew up in Murray. He wanted to be a major league baseball player or astronaut when he grew up. His first job was flipping burgers for 90 cents an hour. Both of his parents came from small, rural towns in southern Utah and taught him the value of hard work and a good education.

Junior attended University of Utah and graduated with a degree in Political Science. He then decided to attend law school at the U also. He had a bishop when he was a teenager that was an attorney and had a big impact on his decision to follow that path. He says, "I also saw the law as a way to accomplish good change without the picketing and violence prevalent during the 60's when I grew up."

He says that he became a prosecutor by accident. A law school friend, Judge James Taylor, convinced him to come and work with him as the Spanish Fork City Attorney. When Judge Taylor left, Junior stepped in after him.

Junoir says one of his rewarding experiences occurred when he was out shopping with his wife. "One of the clerks called me by name (something my wife dreads). My blank stare indicated I didn't remember him. When he told me his name, I recognized him as a defendant I had prosecuted a few years previously. He was stealing from family members to feed a drug habit. I insisted that he complete a drug program offered at the County Jail. He resisted that with everything he had. I'm sure he hated me for that. He stated to me that night, a few years later, "I just want to thank you for making me do the drug program at the jail. I really fought that. However, that saved my life. Thank you." That makes it all worthwhile."

One of his most challenging experiences has been trying to explain to a victim why a criminal can't spend the next 15 years in jail for a misdemeanor offense. Junior recounts one of his funny experiences: he had a young man who was stopped for some minor offense and gave a false name because he thought he might have an arrest warrant out. The name he used was a friend, who did have a warrant out for his arrest. He quickly backtracked and gave his true name, but got charged with providing a false name anyway. He pled guilty and the judge asked Junior for a factual basis. He says, "When I shared what happened, the whole courtroom burst out laughing. It was to the point, I was biting my tongue. I could see the judge struggling to keep a straight face, but finally managed to ask if that was accurate. The defendant received a fine and a great deal of public embarrassment."

Junior met his wife while attending Dixie College. They now have four children. Junior enjoys fishing, camping, vegetable gardening. He says he once knew Japanese and that he would go back to Japan in a heartbeat.

Quick Facts

Law School: Utah

Favorite Food: Venison and fresh vegetables

Last Book Read: The John Taylor Papers by Samuel and Raymond Taylor

Favorite Dessert: Fudge Brownie with Ice Cream

Favorite Music: Andy Williams or the Beach Boys

Favorite Quote: Don't postpone promptings, rather act upon them. Thomas S. Monson

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to seize the cash for forfeiture. The respondents claim the affidavit was false and misleading. The respondents filed suit against petitioner in the US District Court for the District of Nevada, seeking damages. The district court dismissed the suit finding the court did not have personal jurisdiction over petitioner in Nevada for his actions in Georgia. The court of appeals reversed.

The US Supreme Court granted Certiorari and held, "[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: Petitioner's rele-vant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdic-tion. We therefore reverse the judgment of the Court of Appeals." *Walden v. Fiore*, 571 U. S. No. 12-574 (2014)

New Standard For Aiding and Abetting In Federal Felonies

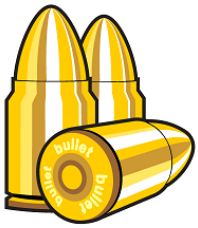
Rosemond was arrested after a drug deal went bad. Rosemond and two associates arranged to sell a pound of marijuana to two people. At the drug deal the buyers took the marijuana, punched the seller next to them and then ran. Someone, it is disputed who, pulled out a pistol and fired shots at the buyers as they escaped with the drugs. After the gun shots were reported police responded and pulled the car over. At trial, the prosecution presented two theories: Either Rosemond was the shooter, or he knew of the use of the gun in connection with drug trafficking. Both of these theories would allow Rosemond to be charged as the principle because of the statutory construction.

The petitioner argued to be convicted of a felony the government needed to prove he had intentionally taken "some action to facilitate or encourage his cohort's use of the firearm to be found guilty of aiding and abetting." The U.S. Supreme Court held "An active participant in a drug trans-action has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun. This must be advance knowledge—meaning, knowledge at a time when the accom-plice has a reasonable opportunity to walk away." The case was remanded because the Supreme Court found that based on the standard they set forth, the jury instructions given at trial were in error. *Rosemond v. United States*, 572 U.S. 2014

Case Remanded To Determine If Failure Of Expert Was Prejudicial

Defendant was accused of three robberies and two murders that occurred during the robberies. The robberies were all of restaurants, happened in the same manner and were only a few months apart. A .38 revolver was used in each of the crimes, with six bullets recovered in total. A victim from the last robbery survived and gave the police a description. The victim was shown a number of photos, based on the description, and identified defendant as the robber.

At trial the only evidence against defendant was a .38 revolver recovered from his residence. The State's expert testified that the bullets recovered from all the crime scene matched and were fired from the gun. Defendant's counsel was given a budget to hire an expert from the court, with the caveat that if he needed more to ask the court for more. Instead of asking for a large budget, defense counsel hired a pathetic expert who was badly discredited for not being an expert in the field, having only one eye, and only having testified twice on this topic and one of those times being about a shotgun.



Defendant was convicted and sentenced to death.

Post-conviction, Defendant hired three experts all whom discredited the State expert's findings concerning the revolver. However, the circuit court denied defendant's post-conviction petition on the ground that defendant had not been prejudiced by his first expert's allegedly poor performance because tes-timony did not depart from what defendant's post-conviction experts said: The bullets could not be affirmatively matched either to one another or to the defendant's revolver.

The U.S. Supreme Court held, "Because no court has yet evaluated the prejudice ques-tion by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether defendant's attorney's deficient performance was prejudicial under *Strickland*." *Hinton v. Alabama*, 571 U. S., No. 13-6440 (2014)

Defendants Cannot Challenge Underlying Probable Cause

Defendants were indicted by federal grand jury for a scheme to steal prescription medical devices and resell them for profit. The couple allegedly stole the medical devices from Kerri Kaley's employer, a subsidiary of Johnson & Johnson, and transported them across state lines to sell and launder the proceeds. Based on the indictment, the Government sought a restraining order under §853(e)(1)to prevent the couple from transferring any assets involved in the alleged offenses. This included a $500,000 certificate of deposit the couple wanted to use for legal fees. The defendants appealed and the U.S. Supreme Court granted certiorari.

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In answering the question, whether criminal defendants are constitutionally entitled, at a hearing considering the legality of the seizure, to contest a grand jury's prior determi-nation of probable cause to believe they committed the crimes charged. The Supreme Court examined this question through the two other opinions they have issued, *Monsanto* and *Caplin & Drysdale* . The court held, "We held in *Monsanto* that the probable cause standard governs the pre-trial seizure of forfeitable assets, even when they are needed to hire a lawyer. And we have repeatedly affirmed a corollary of that standard: A defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime. In combi-nation, those settled propositions signal defeat for the Kaleys because, in contesting the seizure of their property, they seek only to re-litigate such a grand jury finding." Hence the Supreme Court held, "The Kaleys cannot challenge the grand jury's conclusion that probable cause supports the charges against them." Kaley Et Al *v.* United States, 571 U.S. (2014)

Utah Supreme Court

Supreme Court Lacked Jurisdiction

The Utah State Retirement and Insurance Benefit Act (Retirement Act or Act), found in Title 49 of the Utah Code, was enacted to provide a comprehensive system of retirement and health insurance benefits to state and local public employees throughout the State of Utah. To administer the program in a uniform and consistent manner, the legislature created an administrative office charged with administering the Act—the Utah State Retirement Office, also known as Utah Retirement Systems (URS)—and a governing body—the Utah State Retirement Board (Retirement Board).

The plaintiffs are employees of the Kane County Hospital (the Hospital) and complained to URS that the Hospital failed to adequately fund their retirement benefits as required by the Act. The plaintiffs sued to recover the defined benefits to which they were entitled under the Act and consequential damages flowing from the failure to provide the required benefits, including attorney fees and costs.

The district court concluded it lacked jurisdiction because Plaintiffs failed to exhaust their administrative remedies under the Utah Administrative Procedures Act (UAPA) and dismissed the complaint. The court of appeals reversed. The appellate court acknowledged that UAPA deprives a court of subject matter jurisdiction in any action for which administrative remedies are available, but have not been exhausted. But, reasoning that the scope of the URS proceeding before the Retirement Board was narrower than the action in the district court, the court of appeals accepted Plaintiffs' contention that "some of the causes of action" fell outside the scope of the Retirement Act. However, the court of appeals did not identify which claims were outside the scope of the Retirement Act because it found that "under the unique facts and circumstances of this case, the scope and nature of most of the claims that should have survived dismissal cannot be determined until the administrative remedies are exhausted." The court of appeals also reasoned that "each of the claims . . . will be affected by the outcome of the administrative proceeding irrespective of the result." Thus, according to the appellate court, while certain claims were properly subject to dismissal, the impossibility of ascertaining their scope required a stay of the action pending the outcome of the administrative proceedings. The court of appeals did not address the merits of Defendants' alternative arguments.

The Utah Supreme Court granted writ of certiorari. The Supreme Court held, "All of the claims asserted in Plaintiffs' complaint fall within the scope of the Retirement Act, which covers "any dispute regarding a benefit, right, obligation, or employment right under" Title 49. Plaintiffs failed to meet their burden to establish that they should be excused from exhaustion in this case, and Plaintiffs concede they did not exhaust their administrative remedies. [The Supreme Court] therefore lack[s] jurisdiction over Plaintiffs' claims. [The Supreme Court] reverse[s] the court of appeals and affirm[s] the district court's dismissal of Plaintiffs' complaint for lack of jurisdiction. *Ramasy v. Kane County*, 2014 UT 5

Defendant Acquitted Of Illegal Sexual Activity

Defendant approached two young girls while they were riding their bikes. He was sucking on a candy pacifier and wearing shorts that exposed part of a diaper he was wearing. While talking to the girls he pulled down his pants to expose the diaper, which was too small and held together by clear tape. The diaper covered his pubic area and most of his buttocks and so the girls couldn't see his buttocks. He then gave the girls a flyer which had children in suggestive poses or lying on beds wearing diapers. The children on the flyer were not engaged in sexual conduct and were not exposed. The flyer had two website URLs written on it, both were linked to child pornography.

Defendant was arrested and charged with two counts of lewdness involving a child and one count of sexual exploitation of a minor. Defendant was found guilty on all three counts. Defendant appealed claiming the evidence was insufficient to sustain convictions for lewdness or sexual exploitation of a minor.

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On the Lighter Side

Senior Citizen Arrested For Food Fight

A senior citizen was arrested after a food fight broke out at a Golden Corral. Apparently the fight broke out after someone went around the defendant in line to pay while she was getting a drink. However, the fight got real when someone was slapped and then threw a plate of food, injuring another senior citizen. Be warned – those early birds ain't messin' around.

http://www.witn.com/home/headlines/Senior-Food-Fight-Lands-Early-Bird-Diner-In-Jail-251220081.html

Hawai'I Police Allowed to Have Sex With Prostitutes

Hawaii's legislature recently debated getting rid a bill that created an exemption for police having sex with prostitutes during investigations. Police have been mum on how often they use the bill, for obvious reasons. Police say the bill is necessary to catch the law breakers in the act-even if other agencies aren't doing it this way. There was some pushback from the public and many activists groups.

http://legalnews.findlaw.com/article/253e4dd10ab4a204c5a791d5a6b08519

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The Utah Supreme Court held that the standard for reversal "when addressing a sufficiency of the evidence claim, we may reverse only when ―it is apparent that there is not sufficient competent evidence as to each element of the crime charged ." The supreme court then held that the term, "other acts of lewdness" applies to conduct that does not precisely amount to one of the enumerated lewd acts but that ―dramatize[s], gesticulate[s], imitate[s], or . . . simulate[s]‖ such acts. The court reversed defendant's convictions for lewdness involving a child for lack of evidence.

The court also adopted "a widely endorsed standard of ―lascivious exhibition as ―a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Based on the facts concerning the flyer defendant was distributing the supreme court reversed defendant's conviction for sexual exploitation of a minor. *State v. Bagnes*, 2014 UT 4

Utah Court of Appeals

Court Ordered To Hold Evidentiary Hearing

Defendant and two friends went to a strip club and were approached by a bouncer. There is some dispute about the facts, but the bouncer and defendant began fighting. Defendant put the bouncer in a headlock and brought him to the ground. Other patrons and employees jumped into the fight. The bouncer suffered a broken nose, fractured eye socket, and damage to his knee, teeth, and head. Defendant received a head injury and believed he had been cut with a sharp object during the fight. When police approached defendant in his truck he saw blood on defendant's face and hands and defendant told the officer, "Well, the bouncer put his hands on me so I beat him up." Defendant was charged and convicted of felony assault.

Defendant moved for a new trial claiming ineffective assistance of counsel and that new evidence warranted a new trial. Defendant presented the court with affidavits from his trial counsel, and new witnesses as new evidence. The district court denied the request and defendant appealed.

On appeal, defendant claimed the district court erred in denying his motion for a new trial. The Utah appellate court held the district court should have held an evidentiary hearing to determine if his counsel's assistance was ineffective and what the new evidence could do to bolster defendant's case. In reversing and remanding the case for the evidentiary hearing the appellate court held the new evidence cannot be dismissed as "merely cumulative" when it might help settle the balance in what amounted to a credibility determination between defendant's sole testimony and that of the State's many witnesses. *State v. Stidham*, 2014 UT App 32

Expanded Frisk For Weapons Upheld

Police went to a home to search for a suspect on August 11, 2010. The person who answered the door, Mirowski, consented to a search of the home. While in the home, police saw two men asleep on the couch; the defendant and another man, Temple. While one detective went to search the home for the suspect Detective Warren stayed in the living room and began a casual conversation with defendant and Temple. During the conversation Detective Warren noticed several knives, screwdrivers, and a marijuana pipe on a toolbox in front of Temple. Warren then noticed defendant fidgeting and getting agitated. Warren then noticed a knife under the leg of defendant and asked him to stand up so he could take the knife for the officer's safety. Defendant allowed Warren to seize the knife. Warren then asked defendant if he had anything else on his person Warren should worry about and if he had permission to search defendant. Defendant refused to allow the search so Warren asked him to sit down and be still.

A few moments later, after Warren had left the room and re-entered, Warren again saw defendant making furtive movements and asked defendant if he could search him, "just for weapons to make sure you don't have anything that is going to hurt." Defendant consented to the search for weapons and Warren found a syringe in defendant's pocket. Warren then placed defendant under arrest and sat him back in the chair he was sitting in, careful to search the area for drugs before allowing defendant to sit down. A few minutes later defendant was fidgeting again and Warren looked over and saw meth at defendant's feet, which was clearly not there before defendant sat in the chair. Defendant was charged and convicted of possession of methamphetamines.

Defendant appealed claiming the evidence should have been suppressed because defendant only gave the officer permission to search him for weapons. The Appellate court held, "Because Defendant has not shown that Detective Warren did more than "pat down a suspect's outer clothing and feel an object whose contour or mass [made] its

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identity immediately apparent," the search did not exceed the scope of a Terry frisk or defendant's consent to search for weapons. The court affirmed the conviction. State v. Burdick, 2014 UT App 34

Jury Instruction On Receiving Stolen Property Improper

Defendant sold a stolen iPod to a pawn shop two weeks after the iPod was stolen from a parked car. The pawn shop clerk recorded defendant's personal information together with a description of the iPod and its serial number into a database as required by law. The clerk also created a pawn slip with the same information which defendant signed and marked with his fingerprint. After the victim reported the iPod stolen, the police used the pawnshop information to identify defendant as the seller of the iPod. Two fingerprint expert from the police forensic unit agreed that the fingerprint on the pawnshop slip matched defendant's fingerprint. Defendant was charged with one count of theft by receiving stolen property and one count of theft by deception.

At trial the government relied on the presumption of law in jury instruction 33 which states, "*The law presumes that possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property. While the law regards the facts giving rise to the presumption as evidence of the presumed fact, the presumed fact must on all evidence be proved beyond a reasonable doubt.*" Defendant objected to this jury instruction, but was overruled and convicted.

On appeal defendant challenged his conviction arguing jury instruction 33 unconstitutionally shifted the burden from the State to Defendant by instructing the jury to presume defendant stole the iPod, once the government had proven he possessed it. The appellate court agreed that the instruction was given in error and defendant was prejudiced by the error. The court held defendant was prejudiced because the State relied on the jury's application of the presumption to reach a conviction for each offense and the court was not persuaded that the error was harmless beyond a reasonable doubt. State v. Crowley, 2014 UT App 33

Solicitation Of Murder Related To Initial Proceedings

Lingmann worked as a subcontractor for a family owned business between 2005 and 2008. The business was owned by a husband and wife who liked to run the business like a family. They often invited their daughters to lunches and to spend time in the offices around the staff. Lingmann became familiar with Daughter and eventually had a sexual relationship with her. Daughter was a minor at the time and Lingmann sent pornographic images to her phone and had unlawful sex with her multiple times. Eventually daughter brought the relationship to her parents' attention and the relationship stopped. After the relationship ended Lingmann was charged with multiple crimes and held in the Salt Lake County Jail.

While in jail, Lingmann became close with his cellmate and asked cellmate to kill the parents, blaming them for turning Daughter against him. Lingmann offered $8,000 and his truck to cellmate as payment for killing the parents. Lingmann then changed his mind and told cellmate to kill the whole family. Eventually, cellmate told the authorities who gave him a recorder to record the requests. Cellmate recorded conversations where Lingmann explained the layout of the house, where the victims lived, and discussed the details of payments. Lingmann was charged with six counts of soliciting murder in retaliation for the initial prosecution. Lingmann was found guilty of all six counts and sentenced to six consecutive sentences of five to life.

Lingmann appealed arguing ineffective assistance of counsel, insufficient evidence to support conviction, and that he should have only been sentenced for once inchoate crime. The Utah Court of Appeals held Lingmann's counsel did not provide ineffective assistance because his tactical decision to concede the elements of the offense and to focus on Cellmate's credibility by arguing a voluntary-termination defense was reasonable. Defendant also argued he could not be convicted of soliciting murder in retaliation for the initial prosecution because the sisters of Daughter were not involved in the initial legal proceedings. The appellate court held there was sufficient evidence presented at trial to show the solicitation of the aggravated murder of Daughter's three sisters was motivated by the initial proceedings. Lastly, the appellate court held defendant did not carry his burden to show that the court's imposition of consecutive sentences was inappropriate or excessive. The appellate court held defendant failed to recognize that Utah allows for the imposition of consecutive sentences for offenses arising out of a single criminal episode. State v. Lingmann, 2014 UT App 45

Accomplice Liability Explained

Around 3:30 a.m. defendant entered a Maverik convenience store with another man They went directly to the cooler section, where Defendant picked up a case

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of Budweiser beer. The other man then stood by the door while Defendant approached the store clerk at the counter. The store clerk later testified that the man by the door was acting in a suspicious manner, alternately watching Defendant and looking outside. The store clerk informed the men that he was going to deny the sale because it was after 1:00 a.m. Defendant offered the clerk $100 for the beer anyway, and the clerk refused. At some point during the clerk's interaction with Defendant, the man at the door raised his shirt slightly, moved his hand to his hip, and informed the clerk he had a gun. Defendant then grabbed the beer, retained his $100 bill, and fled with the other man in a car driven by an unidentified individual. The store clerk called the police. The incident was captured by multiple surveillance cameras located in the store.

On appeal defendant argued the evidence was insufficient to support his aggravated robbery conviction because the evidence was not sufficient to show that he possessed the necessary mens rea. The facts showed defendant stole the beer knowing a threat involving a gun had been made and so the appellate court held defendant's conviction of aggravated robbery under an accomplice theory is legally sustainable.

Defendant was also involved in a convenience store robbery in June of 2010. Defendant had entered a Maverik convenience store around 2:00 a.m. with two other men. Defendant and one of the men went to the beer cooler and each grabbed two cases of Budweiser beer. The third man stood at the door, holding it open. Defendant rushed out the door while the man holding the door pointed the store clerk and shouted. On video the man holding the door can be heard saying "shoot you," even though most of what he said was inaudible. Defendant was charged with aggravated robbery, but only convicted of the lesser crime, robbery.

On a separate appeal, resolved in a separate opinion, defendant argued there was insufficient evidence to support his conviction because he was unaware of the threat made by his associate. The appellate court held the evidence was sufficient to support a conviction because the video showed defendant still in the store when his associate started shouting as the store clerk.

Defendant also argued the prosecutor misstated the law to the jury when he used the term "in concert" instead of accomplice liability. This is a lower standard and could have been misleading to the jury. However, the appellate court held this was harmless because the both were possible based on the facts before the jury and therefore the conviction was supported. *State v. Lomu*, 2014 UT App 41

State v. Lomu, 2014 UT App 42

Officer Firing Affirmed

Perez was a police officer employed by the South Jordan City in 2009, when he responded to a call about a suspicious vehicle leaving a shopping complex. Perez intercepted the car and attempted to pull it over. The driver refused and fled into a cul -de-sac. Perez left his car and approached the car with his weapon out, however the driver drove past him and fled. Another officer arrived in time to follow the suspect as he fled. Perez got in his car and then attempted to take a different route to where he thought the

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suspect might be headed. While in pursuit he drove seventy miles an hour on a street with a posted speed limit of thirty-five miles per hour. While speeding he did not activate his lights or siren. Perez met the suspect at an intersection and sped through the intersection following the suspect without activating his siren. The chase ended by Perez and the other officer pinning the suspect's car so it could not move and Perez ordering the suspect to stop before shooting him twice, resulting in the suspect's death.

Perez was fired after this chase for what The Police Chief, Shepherd, categorized as failing to activate his lights and sirens during the chase, combined with previous discipline actions. Perez appealed his termination to the South Jordan City Appeal Board, which affirmed the decision, and then sought relief from the Utah Appellate court. Perez argued the Board abused its discretion by determining he engaged in pursuit when attempting to predict where the suspect was headed and drive to the same spot because he claimed that he was in pursuit if he wasn't following the suspect. The appellate court held that while there where differing definitions of "pursuit" the Board did not abuse its discretion by finding Perez was in "pursuit." Perez also argued the Board erred by finding the termination was proportional to his misconduct and consistent with department discipline for similar offenses. The appellate court held, "The Board did not abuse its discretion when it found that Perez's two May 28 violations, along with his disciplinary history, provided adequate support for Chief Shepherd's decision to terminate him." His termination was affirmed. *Perez v. South Jordan City*, 2014 UT App 31

Quiet Title Action Based On Ordinance and Barred

In 2001 Black Diamond Lodge at Deer Valley Association of Unit Owners (Black Diamond) dedicated a portion of a seventy-eight foot –wide easement that crossed Powder Run at Deer Valley Owner

Association's (Powder Run) Property. The road was build and the public used it to access the Black Diamond Lodge and another adjoining development.

On September 15, 2010, Powder Run filed a complaint against Black Diamond and the City. The complaint was a quiet title and declaratory judgment action alleging Black Diamond and the City "claim a right or interest in the Easement Parcel adverse to the rights and interests of [Powder Run]."

The City moved to dismiss the action and Black Diamond moved for summary judgment, on the basis of the thirty-day statute of limitations in Utah Code section 10-9a-801(2)(a). The district court granted the defendants' motions and denied Powder Run's motion to amend as futile. Powder Run appealed claiming the statute of limitations in Utah Code section 10-9a-801 does not bar its quiet title action and the district court erred in granting summary judgment in favor of Black Diamond and in dismissing the suit against the City.

The Utah Court of Appeals held, "By its terms, Utah Code section 10-9a-801 applies to Powder Run's quiet title action, which challenges the validity of a municipal ordinance. Powder Run's characterization of the ordinance as void does not save Powder Run's claims from the statute of limitations. Because success on Powder Run's quiet title action depends on a successful challenge to the validity of the ordinance, Powder Run's suit does not qualify as a true quiet title action to which no statute of limitations applies. Furthermore, Powder Run is not in actual possession of that portion of the easement dedicated as a public street. Therefore, the district court properly determined that Powder Run's suit was barred because it was not filed within the thirty-day limit set forth in section 10-9a-801. Given this conclusion, Powder Run's motion for leave to amend its complaint would have been futile." *Powder Run v. Black Diamond*, 2014 UT App 43

Court Allowed To Fix Clerical Error, Increasing Sentence

Defendant was charged and plead guilty of distribution of heroin, a second degree felony in exchange for dismissal of five other charges. The plea form identified the charge as a second degree felony subject to a sentence of one to fifteen years in prison. At sentencing the district court identified the conviction as a third degree felony and sentenced him to zero to five years. Defendant never asked for a reduction in his sentence. His sentence was then suspended and defendant was placed on probation for thirty-six months.

After violating probation the district court revoked defendant's probation and imposed the suspended prison sentence. At the revocation hearing the court, sua sponte, noted the error in its original sentence on the heroin distribution conviction. The District Court stated that it was "obviously incorrect" to have imposed a sentence of zero to five years for distribution of heroin, which is a second degree felony. The court explained that the sentence was "something it had to correct" because a sentence that did not comply with the statutory term was illegal. After a short recess, defense counsel agreed that the sentence was incorrect, but asserted that ,theoretically, the Court could have granted [a sentence

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reduction under section] 402 at the time of sentencing that wasn't on the record. The district court disagreed, explaining that defendant never requested a sentence reduction and that it was never the court's intention to reduce defendant's sentence. The court then changed the sentence on the heroin distribution conviction to one-to-fifteen-years imprisonment and ordered defendant committed to the Utah State Prison.

Defendant appealed claiming reduction of a second degree felony to a third degree felony is authorized by section 402, and so the district court's modification of defendant's sentence was improper under Rule 22 of the Utah Rules of Criminal Procedure, which permits only the "correction of an illegal sentence." The State responded that, under the circumstances, the district court simply exercised its authority under Rule 30 of the Rules of Criminal Procedure to correct a clerical error in the sentence. The Utah Court of Appeals agreed with the State and held "the unique circumstances of the case make the district court's change to the sentence merely a correction of clerical error." The appellate court affirmed the district court's decision to correct the error in the original sentence. *State v. Sulz*, 2014 UT App 46

Party Not Able To Include Evidence Of Theory Not Included In Answer

In the late 1980's, UDOT developed a plan to widen Wasatch Boulevard from two lanes to four. In 1992, UDOT filed a condemnation action. In that action UDOT it was trying to acquire all of Walker's property described in the Condemnation Resolution. The action asked the district court to determine and adjudicate the amount to be paid as just compensation. In Walker's answer they did not challenge the Condemnation Resolution's description of the condemned property. In 2011 Walker received an opinion from an expert that there was an additional 8.42 acres, worth an additional $757,800. UDOT sought to exclude this evidence from trial claiming it was irrelevant and should have been brought in a separate suit. The trial court granted the motion in limine to exclude the evidence.

Walker then moved to amend its 1992 answer to include the counterclaims related to this evidence. The district court denied Walkers motion to amend and an interlocutory appeal was filed. On appeal, Walker claimed the district court erred by granting UDOT's motion to exclude, because determining the scope of the pre-expansion right-of-way is a necessary step in determining the value of the condemned property.

The Utah Court of Appeals held Utah's pleading requirements do not allow Walker to raise a theory for the first time in a memorandum opposing a motion to exclude evidence. Since Walker did not originally argue that the pre-expansion right-of-way had never been dedicated and abandoned Walker cannot argue it in the motion in question. The appellate court affirmed the district court's exclusion of evidence that UDOT took additional Walker property not described in the Condemnation Resolution. *UDOT v. Walker Development*, 2014 UT App 30

Tenth Circuit Court of Appeals

Seizure Of Gun Not Suppressible

Brandi Thaxton called 911 to report domestic violence that occurred two days ago. Police responded to the scene because Brandi was afraid for her life. Police entered the home without a warrant, two officers spoke to defendant and one went directly to Brandi to check on her. The officer speaking with Brandi noticed a shotgun and seized it. Defendant was arrested and taken to jail, while on the way to jail the officer found out defendant was a felon and prohibited from possessing a gun.

The U.S. Court of Appeals for the Tenth Circuit held, "incident to an arrest for aggravated assault, police may seize a shotgun from a home when the weapon was not involved in any apparent criminal offense, the crime scene had been secured, and there was no immediate danger to any individual." The Circuit Court then sought to answer another question: Does a de minimis violation of a defendant's property rights make a seizure constitutionally unreasonable and thereby justify suppressing evidence, particularly when suppression is highly unlikely to deter improper police behavior? The court held, "on the unique facts of this case, is, again, no." *United States v. Gordon*, 2014 BL 20616, 10th Cir., No. 12-4170, 1/27/14

Failure of Attorney Not Good Cause

Defendant was arrested for distributing methamphetamine after law enforcement investigated drug trafficking in his town. Law enforcement received a tip that defendant bought and sold drugs in his home. Law enforcement obtained a warrant to search the home based on the information given them, even though the affidavit was not well written. Defendant was convicted on two counts of conspiracy to distribute methamphetamine.

On appeal defendant argued, for the first

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time, that his waive of his rights was otherwise involuntary because it was coerced by threats and promises of leniency from his interrogators. The U.S. Court of Appeals for the Tenth Circuit held, defendant did not have the right to raise this argument on appeal. The court held that there must be "good cause" to raise the argument on appeal and here the defendant's counsel's failure to raise the issue is not "good cause." The Circuit Court affirmed the order to deny the motion to suppress. *United States v. Augustine*, 2014 BL 44087, 10th Cir., No. 12-3269, 2/19/14

Other Circuits/ States

No Expectation Of Privacy Concerning Records Of Third Party Who Received Texts

Petitioner was involved in an embezzlement scheme. Minutes after a co-defendant was told about the investigation he was seen texting others on his personal phone. The State obtained a warrant to obtain the co-defendant's cell phone records from the phone company. The records revealed petitioner was texting the co-defendant and made incriminating statements. Petitioner moved to suppress the evidence claiming the warrant wasn't valid because the defendant had a reasonable expectation of privacy to their phone conversation.

The Appellate Court of Oklahoma held defendants did not have an expectation of privacy once the text messages were delivered to a third party. The court held that because the search was of the phone company's records of delivered text messages of third party, the petitioner had no expectation that the third party could not share her texts with others. *State v. Marcum*, Okla. Crim. App., No. S-2012-976, 1/28/14

Warrantless Search Of Residence As Condition For House Arrest Valid

Defendant was arrested on drug distribution and felony possession of firearms charges. Defendant was released pre-trial and placed on house arrest. As a condition of the house arrest, defendant agreed to allow the Sheriff's Office to search his residence at any time without prior notice and without a warrant. Shortly thereafter, law enforcement received an anonymous tip that defendant had drugs and weapons at his house. Law enforcement searched his home, without a warrant, and found guns and drugs. Defendant was charged with the drug and firearm offenses stemming from the warrantless search. Defendant moved to suppress the evidence and the motion was denied.

The U.S. Court of Appeals for the Eleventh Circuit held defendant knowingly and voluntarily consented to the warrantless search of his home and the warrantless search was thus valid. Defendant argued the consent was coerced because he faced be held in jail or consenting to the terms and being released. The Circuit Court held, "the imposition of the condition does not amount to coercion sufficient to render defendant's consent invalid." *United States v. Yeary*, 2014 BL 16400, 11th Cir., No. 11-13427, 1/28/14

Failure Of Attorney Did Not Meet Standard For Equitable Tolling

Defendant was convicted of sexual battery of a five year old girl and received a sentence of life imprisonment. Defendant wrote a federal writ of habeas corpus and prepared to file the writ within the limitation period. Defendant had an attorney, Goodman, who had filed his direct appeal, review the document pro-se and discussed the period of limitations with him. Defendant was told by a "jailhouse lawyer" that he did not have much time left to file the writ based on the statute, however Goodman disagreed. Goodman assured defendant he still had a year left to file the writ and told defendant to take his time on it. However, Goodman only read the statute and never researched when the time started for the limitation period and was wrong about how much time defendant had left. Defendant ended up filing the writ about a year too late for the limitations period, but with three days to spare according to Goodman.

The U.S. Court of Appeals for the Eleventh Circuit held that Goodman's failure to research the exact deadline for defendant is not enough of a cause for the equitable tolling of the limitations period. The Circuit Court held defendant was not abandoned by his attorney and therefore failed to establish the extraordinary circumstances necessary to qualify for the equitable tolling. *Cadet v. Fla. Dep't of Corr.*, 11th Cir., No. 12-14518, 1/31/14

Condition Of Release Banning Sexually Stimulating Material Vague

Defendant was investigated for drug trafficking after customs agents reported a package addressed to defendant contained heroin. A customs agent, disguised as a UPS driver, delivered the package to defendant. Once a transmitter on the package alerted the package had been opened agents entered the home and arrested defendant. Upon searching the home agents found

paraphernalia, guns, and narcotics. Agents then asked defendant if they could search his computer and found four hours of child

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pornography. Defendant agreed to a plea guilty to the receipt of child pornography in exchange for a dismissal of the possession of narcotics charge.

Defendant received supervised release for a total of fifteen years. As part of his supervised release defendant agreed to the condition that, "defendant shall not view or listen to any pornography or sexually stimulating material or sexually oriented material or patronize locations where such material is available." The U.S. Court of Appeals for the Seventh Circuit held this condition was too broad and vague to be enforceable. Defendant's conviction was upheld, but the case was remanded to revised this condition. *United States v. Adkins*, 7th Cir., No. 12-3738, 1/30/14

New Rule For Authenticating Facebook Posts

Tiffany Parker, the defendant, and Sheniya Brown got into a fight on the street. Witnesses saw the fight and testified that Parker was "getting the best of the pregnant girl [Brown]." Bystander's broke the fight up once, and then Brown returned with a knife and bystanders broke it up again. Police investigated and charged defendant with one count of Assault Second Degree and one count of Terroristic Threatening. Defendant argued she was only acting in self-defense. The State introduced evidence from Facebook to discredit defendant's self-defense argument. Defendant argued the evidence was not properly authenticated, but the trial court allowed the evidence to be considered and found that it satisfied Evidence Rule 901's authentication requirements.

The Delaware Supreme Court held the role of the Judge to be "determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic." The Supreme Court "recognizes that the risk of forgery exists with any evidence and the rules provide for the jury to ultimately resolve issues of fact." The Supreme Court upheld the trial court's ruling. *Parker v. State*, 2014 BL 32616, Del., No. 38-2013, 2/5/14

Prejudice Of Eavesdropping May be Rebutted

Defendant was accused of sexual abuse of his step-daughter. The victim could not recall all the details about the abuse and her testimony about some of the counts was not clear. At trial, defendant was found guilty of a few of the counts, but defendant moved for another trial because he was convicted twice for the same act and the trial court found that another trial was proper.

In between trials defendant's mother and brother confronted the victim, a nine year old girl, about the abuse and videotaped her saying the accusations were not true. This prompted the prosecution to investigate witness tampering charges. The prosecution instructed law enforcement to listen to defendant's jail phone conversations. The officer assigned to listen to them reported he had heard all of defendant's jail phone conversations, even those with his attorney. Prosecution did not allow the officer to tell anyone what was said in those conversations and then reported the violation to defense counsel. Defendant moved to dismiss all charges and overturn his convictions.

Washington State Supreme Court held that the violations are presumed to prejudice the defendant, but that presumption may be rebutted if the State shows the absence of prejudice beyond a reasonable doubt. Here, the court remanded the case for additional discovery. *State v. Fuentes*, 2014 BL 32541, Wash., No. 88422-6, 2/6/14

Federal Law Allows For Harsh Penalty For State Misdemeanors

Defendant approached J.S., a sixteen year old girl, at a high school function and told her he had seen her at Target the other day and that she looked nice. He then sent a friend request through Facebook, told her again how beautiful she looked, and asked that she not inform defendant's high school aged children of their friendship. J.S. informed her parents, who contacted law enforcement.

A FBI agent then took control of J.S.'s Facebook account and established a Yahoo! Email account to instant message defendant. The agent, pretending to be J.S., then participated in sexually explicit conversations with defendant over instant messenger and eventually arranged to meet him for sex. Defendant said he would bring condoms and alcohol. Defendant was arrested at the place he was supposed meet J.S. with condoms, Viagra, alcohol, and flowers.

Defendant was charged with 18 U.S.C. § 2422(b), which requires defendant attempted to coerce a minor to engage in sexual activity for which he could be charged with a criminal offense. Defendant's actions constituted a misdemeanor in Oregon and he was convicted and sentenced to the ten-year mandatory minimum. Defendant appealed claiming the language of §2422(b) is ambiguous, vague, and inconsistent with Congress's expressed intent. Defendant claimed "criminal offense" meant felony. The U.S. Court of Appeals for the Ninth Circuit held, "§ 2422(b) clearly and unambiguously criminalizes attempted sexual activity where the object of the attempt would amount to either

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misdemeanor or a felony under state law." Defendant's conviction was affirmed. *United States v. Shill*, 2014 BL 19816, 9th Cir., 13-30008, 1/24/14

Prosecutors Impropriety Not Plain Error

Defendant was stopped next to another car, obstructing a lane of traffic, when a police officer noticed. The office drove toward the cars, but defendant sped away and turned down an alley. The officer caught up to defendant and turned on his lights. Defendant tried to turn down another street, but slid into a snowbank. The officer got out of his car and as he approached the defendant he could smell marijuana. The officer had a drug dog search the car and it alerted to marijuana in the car. A search found six grams of marijuana, paraphernalia, and a loaded gun. Defendant was charged with possessing marijuana for distribution, possessing a gun in connection with a drug crime, and possessing a gun as a felon.

At trial, defense counsel questioned the officer's account of the incident and called it untrustworthy. In response to that the prosecutor made statements about the officer's trustworthiness, oath of office, and lack of incentive to implicated the defendant.

On appeal, defendant claimed the prosecutor's statements about the officer were improper and led to his conviction. The U.S. Court of Appeals for the Seventh Circuit held, "The prosecutor's reference to the officer's oath of office went outside the record, as in *Cornett*, and was therefore improper." The appellate court also held, "the prosecutor's slips across the line here did not deny [defendant] a fair trial and certainly did not amount to plain error. The prosecutor's slips were mild, and as the government points out, the undisputed evidence against [defendant] was strong." Defendant's conviction was upheld. *United States v. Alexander*, 2014 BL 29878, 7th Cir., No. 12-3498, 2/4/14

Broad Interpretation of Protective Sweep

Law enforcement agents received a tip that defendant was in the country illegally, trafficking meth, and had possibly purchased a firearm. An agent conducted surveillance at the apartment complex and eventually performed a "knock and talk." When the officer knocked on the door a Mr. Reyes-Savedra, boyfriend and roommate of one of the lessees, opened the door and allowed the agents to come inside. The agents then asked if there was anyone else in the home, one of the residents silently indicated someone was down the hallway by nodding in that direction. The agents then went down the hallway and arrested defendant, who had his hands up and came out of the bedroom. The agents then questioned everyone and asked for consent to search. Multiple people consented to the search and the agents found a gun, fake social security card, drugs and paraphernalia.

Defendant was eventually convicted on all counts except on the charge of possession of a firearm in connection with a drug offense. Defendant appealed claiming the trial court should have granted his motion to suppress because the agents conducted a protective sweep without specific, articulable facts indicating the apartment harbored dangerous individuals.

The U.S. Court of Appeals for the Eighth Circuit held that based on the facts of this case the residents of the apartment created a suspicion that there were other individuals in the apartment. The court held, "these facts sufficient to alert the agents as to the possibility that the apartment harbored dangerous individuals. Thus, the agents conducted a lawful protective sweep of the apartment." *United States v. Crisolis-Gonzalez*, 2014 BL 34349, 8th Cir., No. 12-3807, 2/10/14

Evidence Has Ability To Raise Need For Jury Instruction

Defendant was charged with murder after he stabbed his wife to death. Defendant and his wife had been having marital problems, with both parties accusing each other of infidelity. Defendant stated that he heard his wife speaking to her boyfriend, became enraged and threw a cell phone at her. Then he walked closer to hang up her phone and she stabbed him. After a struggle he realized he had killed her and when police came he confessed to killing her.

At trial, the prosecutor sought to bring in evidence of past physical violence defendant had committed against his wife. The court ruled that this evidence would be prejudicial unless defendant raised the affirmative defense of extreme mental or emotional disturbance (EMED). The court told the prosecutor that he could not bring in the evidence unless the defendant notified the court that he was going to raise the defense of EMED. The court the asked defendant if he wished to raise EMED and he said no. The court then did not instruct the jury on EMED and defendant was convicted.

On appeal defendant claimed the circuit court "correctly recognized at the conclusion of the presentation of the evidence, that the EMED instruction was necessary" because Adviento's testimony established "that there was a reasonable explanation for Adviento's EMED" defense.

The Hawa'ii State Supreme Court held that caselaw states, "[I]f the record reflects any evidence of a subjective nature that the

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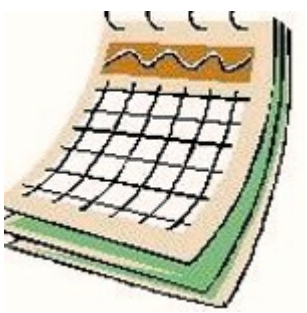
defendant acted under the influence of extreme mental or emotional disturbance, then the issue must be submitted to the jury, and the trial court should instruct the jury on EMED manslaughter." The supreme court further held, "the trial court's obligation to instruct the jury on the EMED defense when it is raised by the evidence does not depend on a request for the instruction by the defense or prosecution. Rather, the trial court's obligation to sua sponte instruct the jury on the EMED defense arises when the record reflects "any evidence of a subjective nature that the defendant acted under the influence of extreme mental or emotional disturbance." *State v. Adviento*, 2014 BL 36244, Haw., No. SCWC-30171, 2/10/14

No Brightline Rule For Staleness

A confidential informant (CI) reported seeing one ounce of cocaine in the possession of the defendant. The police investigated further, confirmed defendant's identity and real name, the address at which the cocaine was seen, and the residents of the home. Law enforcement then took the CI before a judge and had him sign a sworn affidavit that he had seen the cocaine at that residence within the past ten days. A search warrant was issued and cocaine was seized.

Defendant moved to suppress the evidence claiming the warrant was based on stale information. The U.S. Court of Appeals for the Seventh Circuit held that in this case, the court was unsure of when the informant actually saw the cocaine because a range was used to protect the identity of the CI. The Circuit Court also held that there is no brightline rule for the length of time between seeing the crime and the warrant when determining staleness. The Circuit Court also held that the warrant was not stale based on the lack of proof of regular criminal activity, rather affidavits need only provide enough information to lead a reasonably prudent person to believe a search would be fruitful. *United States v. Sutton*, 2014 BL 34351, 7th Cir., No. 13-1298, 2/10/14



Texting And Driving Reckless

Defendant drifted across a median, narrowly missed an oncoming car and struck another car head on. The cars then collided with another oncoming car before coming to a stop. One passenger was severely injured. The investigating officer asked defendant if he had been on his phone and defendant said no. As the police investigated further they found defendant did not apply his breaks at all before colliding with the other cars and that he drifted across the equivalent of two lanes before entering the lane of oncoming traffic. The investigator again asked defendant if he had been on his phone and he said he was checking a text. The police pulled the phone records and found two texts and two calls in the minutes before the wreck.

Defendant was charged and convicted of second degree assault. To obtain that conviction the state was required to prove, beyond a reasonable doubt, the defendant "recklessly caused serious bodily injury to another." Defendant appealed claiming the State did not show he acted recklessly through the evidence they used to prove he was checking his phone at the time of the wreck.

The Supreme Court of New Hampshire held that to overturn the conviction the court would have to find that no reasonable trier of fact could have found that the defendant acted recklessly. The court held the standard for criminal recklessness is whether a defendant was aware of the risk of serious bodily injury resulting from his actions, consciously disregarded the risk, and had knowledge of circumstances that made disregarding the risk a "gross deviation" from law-abiding conduct. In this case the Supreme Court held that a trier of fact could have found that the defendant's actions were reckless. *State v. Belleville*, N.H., No. 2012-572, 2/11/14

State Agency Can't Use Privilege When Investigated By The State

The Pennsylvania Turnpike Commission (the Commission), filed a petition for review of an order denying the Commissions motion for a protective order seeking to prohibit the Office of Attorney General (the OAG) from reviewing allegedly privileged or protected communications between the Commission and its counsel. These actions were set in motion by an OAG Grand Jury investigation into the Commission's employment and procurement practices. The OAG requested over 140,000 documents and the Commission retained more material it believed was protected by attorney client or work product privilege.

The Supreme Court of Pennsylvania granted the petition for review to decide: 1) whether the attorney-client privilege and the work product doctrine apply to records and communications of Commonwealth agencies in the context of a criminal investigation by the OAG; 2) whether the books and papers provision of the CAA, 71 P.S. § 732-208, waives and eliminates the attorney-client privilege and work product doctrine for Commonwealth agencies in a criminal investigation by the OAG; and 3) whether a Commonwealth agency and the OAG are the same "client" for purposes of invoking the attorney-client privilege and work product doctrine in a criminal investigation by the OAG. The Supreme Court held, "the attorney-client privilege does not preclude the production of the

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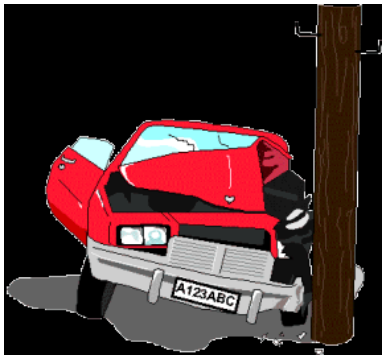
documents sought by the OAG, nor does it entitle the Commission to the privilege log screening process it proposed" because "the agency itself, its employees and officials, are being investigated by the Commonwealth itself, in grand jury proceedings, through the office of the chief enforcement officer of the Commonwealth, due to suspicion of wrongdoing, it is crucial to be mindful that the actual client of the agency's lawyers in such circumstances is the public." *In re 33d Statewide Investigating Grand Jury*, 2014 BL 42651, Pa., No. 85 MM 2012, 2/18/14

Fellow Officer Rule Clarified

Petitioner was involved in a single-car accident. The investigation revealed that there were no mechanical malfunctions, the driver did not apply the brakes, there was no roadway obstruction and it appeared that the driver had followed the fog line off of the road. The officer knew that intoxicated drivers have a propensity to follow the fog line and cause these sorts of accidents. An officer was sent to the hospital to order investigate whether alcohol was involved and immediately smelt alcohol emanating from petitioner's mouth. The officer ordered a blood draw and it revealed petitioner had been driving with a BAC above the legal limit. Petitioner was convicted of DUI, vehicular homicide, manslaughter.



The Supreme Court of Colorado reviewed this case to decide "whether the police possessed probable cause pursuant to the fellow officer rule to draw blood from an unconscious driver following a motor vehicle accident, even though the officer who actually ordered the blood draws lacked independent probable cause." The Supreme Court of Colorado held, "the fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if (1) that officer acts pursuant to a coordinated investigation; and (2) the police possess the information at the time of the search or arrest. Because the record in this case reflects that the police as a whole, pursuant to a coordinated investigation, possessed probable cause to believe that the defendant had committed an alcohol-related offense at the time of the blood draws, the fellow officer rule imputed that probable cause to the officer who ordered the blood draws, meaning no Fourth Amendment violation occurred."*Grassi v. People*, Colo., No. 11SC720, 2/18/14

Jury Must Consider Entrapment On Each Charge

Defendant was contacted by an undercover ATF agent and offered an opportunity to rob a stash house. The agent made it clear that the guards were armed and that the defendant would need to have weapons during the robbery. The agent then made arrangements to meet to discuss the plan. He asked multiple times if the defendants were ready to do the job, and if they had the guns to carry out the job. Defendant responded "yes" many times.

At trial, defendant's counsel objected to the jury instruction that told the jury to consider each charge and then consider whether entrapment applies to that individual charge. The defendant argued that if he was entrapped for one of the charges then he was entrapped for all of them. The U.S. Court of Appeals for the Eleventh Circuit held, "The trial court did not abuse its discretion by instructing the jury to consider entrapment separately as to each count." The Circuit Court held that the jury should be allowed to determine if the defendant was predisposed to commit the individual crime he was enticed to commit by the government, rather than the entire scheme he was enticed to participate in. *United States v. Isnadin*, 2014 BL 39823, 11th Cir., No. 12-13474, 2/14/14

Expectation Of Privacy To Content Of Phone Held By Jail

Defendant was arrested for a class C misdemeanor of causing a disturbance on a school bus. While defendant was in custody the school resource officer heard that defendant, the previous day, had taken a photo of someone while in the bathroom. The officer drove over to where defendant was being held and took his cell phone out of the jail property room, searched the phone until he found the photo and printed the photo. The officer then seized the phone as evidence. The officer did not have a warrant and did not apply for one before searching the phone.

Defendant moved to suppress the evidence found on the phone for an illegal search. The trial court granted the motion to suppress and the State appealed. On appeal, defendant claimed the search was illegal. The Texas Court of Criminal Appeals held the search was illegal because the defendant had some expectation of privacy to the phone, even though the phone was in the custody of the of the jail while defendant was incarcerated. *State v. Granville*, 2014 BL 51849, Tex. Crim. App., No. PD-1095-12, 2/26/14

Subject Of Protective Order Denied Right to Challenge Warrant

A package was intercepted by law enforcement because it contained heroine. Law enforcement then obtained an anticipatory search

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warrant of the home and the package. The package was repackaged and delivered to defendant at the home of his ex-wife. Law enforcement was alerted the package was opened and entered the home. They searched the home found the heroine, packaging materials, and paraphernalia. Defendant was arrested, admitted he was staying at the home of his ex-wife for few days and that he had brought the materials to the home. He also admitted he was the subject of a Protection Order and was not allowed to be in the home, communicate with his ex-wife, except on child custody matters, and his ex-wife's consent could not override the Order. Defendant was charged with possession with intent to distribute.

After defendant's motion to suppress was dismissed he appealed and argued the warrant was invalid. On appeal, the U.S. Court of Appeals for the Third Circuit held defendant did not have standing to challenge the legitimacy of the warrant because he had no right to privacy at the home, as he was legally prohibited from entering the home when he brought the evidence into the home. *United States v. Cortez-Dutrieville*, 3d Cir., No. 13-2266, 2/26/14

Court Closures Upheld

This appeal involves two consolidated cases. In the first, Defendant lived on the Navajo reservation in Arizona surrounded by family. In 2007, defendant was caught sexually assaulting a cousin in the outhouse, but no investigation was conducted. Then in 2010 a young cousin of defendant told her mom that defendant had sexually assaulted her and her younger cousins. Because of the age of the victims the Government sought to have the courtroom closed during their testimony. The district court granted the motion and ordered the courtroom closed when the victims testified. Defendant was convicted.

In the second case, defendant lived with his girlfriend, Sandra, and her children from prior relationships. The victim, R.J., was one of Sandra's children and reported the abuse to a school counselor. R.J. told officials that defendant had forced her to have sexual intercourse with him, hit her, threatened to kill her mother, and whipped her and her siblings with a stick. The government moved to have the courtroom closed during R.J.'s testimony because of the difficulty she had discussing these events. The court granted the motion out of concern for R.J.'s ability to give her testimony in open court.

On appeal, defendants claimed their Sixth Amendment right to a public trial was violated by closing the courtroom during the victim's testimonies. The U.S. Court of Appeals for the Ninth Circuit held that this right to a public trial is not absolute and may be "overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." The court further explained there are four factors to be considered on a case-by-case basis. Those factors are: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest of overriding importance, the trial court must consider reasonable alternatives to closing the proceeding and the trial court must make findings adequate to support the closure. The Circuit court held that the trial court, in both cases, properly considered the four factors and that the court closure did not violate either defendant's Sixth Amendment right to a public trial. *United States v. Yazzie*, 2014 BL 56023, 9th Cir., No. 12-10165, 2/27/14

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 10-11	SPRING CONFERENCE *Legislative and case law updates, civility/professionalism and more*	Sheraton Hotel Salt Lake City, UT
June 18-20	UTAH PROSECUTORIAL ASSISTANTS ASSN. ANNUAL CONFERENCE *Training for para-legals and secretarial staff in prosecutor offices*	Homestead Resort Midway, UT
July 31 - August 1	UTAH MUNICIPAL PROSECUTORS ASSN. SUMMER CONFERENCE *Training for city prosecutors and others who carry a misdemeanor case load*	Crystal Inn Cedar City, UT
August 18-22	BASIC PROSECUTOR COURSE *Trial advocacy and substantive legal instruction for new prosecutors*	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE *The annual CLE and idea sharing event for all Utah prosecutors*	Courtyard by Marriott St George, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE *Training designed specifically for civil side attorneys from counties and cities*	Zion Park Inn Springdale, UT
November	ADVANCED TRIAL SKILLS COURSE *For felony prosecutors with 3+ years of prosecution experience*	Location TBA Salt Lake Valley

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

NATIONAL CRIMINAL JUSTICE ACADEMY

(NDAA will pay or reimburse all travel, lodging and meal expenses - just like the old NAC)

May 12-16	TRIAL ADVOCACY I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
June 9-13	TRIAL ADVOCACY I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
July 7-11	TRIAL ADVOCACY I SUMMARY Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT

Calendar

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

April 1-4	EQUAL JUSTICE FOR CHILDREN Summary Agenda Registration *This course is designed for those beginning a career as a child abuse professional*	Grand Rapids, MI
April 7-11	THE DIGITAL PROSECUTOR Summary Flyer Registration *Designed to keep you up-to-date with the latest trends and developments in technological prosecution*	Detroit, MI
May 19-23	childPROOF Summary Application Agenda *Advanced Trial Advocacy for Child Abuse Prosecutors. There will be no attendance fee for this course. Only 30 prosecutors will be selected to attend.*	Washington, DC
June 2-6	OFFICE ADMINISTRATION Agenda Summary Registration *For Chief Prosecutors, First Assistants, Supervisors of Trial Teams and Administrative Professional Staff*	Salem, MA
June 9-18	CAREER PROSECUTOR COURSE Flyer Registration *NDAA's flagship course for those who have committed to prosecution as a career*	San Diego, CA
June 23-27	INVESTIGATION & PROSECUTION OF CHILD PHYSICAL ABUSE & FATALITIES Summary Registration	Baltimore, MD
June 23-27	UNSAFE HAVENS I Summary Agenda (registration link coming) *Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation. No registration fee for this course, which will be taught at AOL headquarters campus.*	Dulles, VA
July 14-17	ChildProtect Summary Agenda Application *Trial Advocacy for Civil Child Protection Attorneys. By application only. 30 attys. will be selected to attend.*	Winona, MN
October 6-10	STRATEGIES FOR JUSTICE Summary (Registration link coming) *Advanced Investigation and Prosecution of Child Abuse and Exploitation*	Phoenix, AZ
November 17-21	UNSAFE HAVENS II (application link forthcoming) *Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children. The course is by application and only 30 prosecutors will be selected to attend.*	Dulles, VA

* For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no links, that information has yet to be posted by NDAA.